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Nos. 85-1377, 85-1378, and 85-1379

IN THE

Supreme Court of the United States

October Term, 1985

Charles A. Bowsher, Comptroller General of the United States,

Appellant,

v.

Mike Synar, Member of Congress, *et al.*,

Appellees.

United States Senate,

Appellant,

v.

Mike Synar, Member of Congress, *et al.*,

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Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, *et al.*,

Appellants,

v.

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On Appeals from the United States District Court for the District of Columbia

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BRIEF *AMICUS CURIAE* OF WILLIAM H. GRAY III ET AL., MEMBERS OF CONGRESS

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QUESTION PRESENTED

Does the Balanced Budget and Deficit Control Act, which assigns to the Comptroller General the power to set overall spending levels for federal programs and departments, involve an unconstitutional delegation of Congress' power under article I, Section 9 of the Constitution to ensure that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law"?

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BRIEF *AMICUS CURIAE* OF WILLIAM H. GRAY III ET AL., MEMBERS OF CONGRESS

William H. Gray, III, Member of Congress from Pennsylvania, and Chairman of the Committee on the Budget of the U.S. House of Representatives, respectfully submits

this *amicus curiae* brief in support of Appellee's position that the judgment of the District Court[1] should be affirmed. Mr. Gray is joined on this brief by Representatives Jack Brooks, John Conyers, Jr., Thomas J. Downey, Paul E. Kanjorski, Mike Lowry, Bruce A. Morrison, Mary Rose Oakar, Patricia Schroeder, Edolphus Towns, Bruce F. Vento and Ted Weiss. Written consent to the filing of this brief has been obtained from all parties, and copies of those consent letters have been filed with the Clerk of this Court.

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amicus William Gray has been a Member of Congress for 8 years, and has been Chairman of the House Committee on the Budget since 1985. As Budget Committee Chairman, Mr. Gray was a key member of the House-Senate Conference Committee that wrote the Balanced Budget and Emergency Deficit Control Act of 1985.[2]

Amicus Jack Brooks has been a Member of Congress since 1953, and since 1975 Chairman of the Government Operations Committee, which has legislative jurisdiction over the acts governing the congressional budget process. Mr. Brooks, whose views on the Deficit Control Act's constitutionality are further explained in the 1985 volume of the Texas Law Review, was an active participant in congressional consideration of the Act.

The other *amici* are all members of the 99th Congress who participated actively in House deliberations leading to passage of the Deficit Control Act. They include members of the House-Senate conference in which the provisions of the Deficit Control Act were developed and agreed upon.

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[1] *Synar v. United States,* No. 85-3945 (D.D.C. Feb. 7, 1986), J.A. 27.

[2] Pub. L. No. 99-177, 99 Stat. 1037 (1985) (hereinafter the "Deficit Control Act" or "the Act"), J.A. 103.

As members of Congress who were directly involved in the development of the balanced budget legislation, we are committed to making it work effectively. We are familiar with the considerations that dictated the decision to allocate automatic spending reduction responsibilities to the Office of Management and Budget, the Congressional Budget Office and the General Accounting Office (Section 251 of the Deficit Control Act). We are also familiar with the development of the fallback provision (Section 274(f) of the Deficit Control Act) which takes effect if the Act's "trigger mechanism" is declared unconstitutional, and are in a position to assess the viability and workability of this fallback mechanism.

In addition, we have a direct stake in the outcome of this litigation. As the District Court found[3], if the automatic spending reduction provisions of the new law are upheld, they would interfere with the ability of members of Congress to participate in decisions on raising revenue and authorizing appropriations for government programs.

As members of Congress, we fully support the fundamental goals of the Deficit Control Act. A national debt that now exceeds $2 trillion — nearly triple the level of just 10 years ago — threatens to impair the Nation's economic vitality and our standing as one of the world's foremost industrialized powers. It is imperative that the Nation take steps to control deficits of this magnitude, lest the next generation be left with a standard of living significantly lower than we currently enjoy.

However, while we support the goals of the Deficit Control Act, we believe the Act entails an unconstitutional abdication of the congressional responsibility for spending decisions. Under the Constitution, the Comptroller General cannot be assigned the power to determine overall spending

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[3] *Synar v. United States, supra* note 1 at J.A. 78.

limits for federal programs and agencies; only Congress and the President together can exercise that power. The Comptroller General's involvement in the sequestration process must be eliminated, and the alternative procedure provided by Congress in Section 274(f) of the Act should be permitted to take effect.

Based on our experience in Congress, we believe the budget reduction goals of the Deficit Control Act can best be achieved without reliance upon the Act's constitutionally flawed provisions.

SUMMARY OF ARGUMENT

Under article I of the Constitution, fundamental responsibility for the raising of revenue and the authorization of appropriations is committed to the legislative branch.[4] The policy judgments inherent in revenue and spending decisions are central to the most basic of legislative powers. The exercise of these powers is inevitably influenced by the political philosophy and affiliations of legislators individually, and of the legislature as a body. When Congress abdicates these powers and responsibilities to an agency not solely within the legislative branch, as it has done here, the statute violates the opening words of article 1 of the Constitution, which prescribes that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."[5].

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[4]U.S. Const. art. I, §§ 8 & 9.

[5]U.S. Const. art. I, § 1. We do not mean to imply that the assignment of these powers to an office *within* the legislative branch – the Congressional Budget Office, for example – would be any more proper. As we see it, the principal vice in the Deficit Control Act is the wholesale abdication of decision-making authority over spending levels, which the Constitution empowers the Congress – and only the Congress – to set through the normal legislative process.

This is especially so in this case because Congress has improperly conferred inherently legislative functions upon the Comptroller General without providing clear standards to guide him in the exercise of these broad powers. Therefore, the provision giving the General Accounting Office (hereinafter GAO) sequestration powers must fall as an excessive delegation of legislative authority.

We thus agree with the decision of the District Court below that the Deficit Control Act is unconstitutional, but on different grounds. The District Court, as we read the opinion, found the Act defective on the theory that much of the power involved here is executive in nature, and thus cannot be exercised by an officer over whom Congress exercises a substantial measure of control – particularly, the power to participate in that officer's removal.

Our view of the Deficit Control Act is somewhat different. The vice is not in the hybrid nature of the Comptroller General's office; indeed, given the number of legislative-related functions assigned to the Comptroller General by other existing law, we view it as entirely warranted that Congress has retained the levers of control contained in a number of statutes enacted by Congress beginning in 1921. Rather, the vice here lies in the wholesale abdication of Congress' authority to set overall spending levels for agencies and programs – an abdication which Congress could no more assign to the President, or to an officer directly accountable to the President, than it can to a hybrid agency such as the General Accounting Office. In short, the fault is not in the *recipient* of this extraordinary grant of authority; it is in the *act of delegating* such wide-open authority in the first place.

If this Court were to endorse the reasoning of the District Court below and find that Congress' control over GAO invalidates the assignment of powers to the Comp-

troller General, it would be inappropriate to "save" the Deficit Control Act by invalidating the removal provisions of the Budget and Accounting Act of 1921.[6] There can be little doubt, as the District Court noted, that the fact the Comptroller General is by law an officer responsive to the needs and wishes of the Congress was a key element in the House-Senate compromise reached on the Act.[7] We think it extremely unlikely that Congress could have reached a compromise on the Deficit Control Act without this provision. Congress was unwilling to assign the far-reaching sequestration functions to the President of the United States, to the Office of Management and Budget, or to any other agency or official in the Executive Branch. The Comptroller General was chosen precisely because he is an officer accountable to the Congress, nominated by the President from names submitted by Congress, and subject to removal by joint resolution passed by Congress.

We believe it would violate the intent of Congress if this Court sought to save the Deficit Control Act by striking down the removal provision of the 1921 Act, a law that has stood on the books for sixty-five years. Such a step would also lead, without any basis in law, to a fundamental reordering of the entire relationship between Congress and GAO.

Finally, we do not believe that GAO's role in the sequestration process need be saved on the grounds of legislative necessity. Congress specifically provided for a legislative fallback to the GAO authority which we believe can be equally effective in achieving the Deficit Control Act's important goals. Under the fallback procedure, a Temporary Joint Committee promptly reports a Joint Reso-

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[6]Budget and Accounting Act of 1921, Pub. L. No. 13, ch. 18, 42 Stat. 20 (1921) (31 U.S.C. §§ 701, *et seq.*) (hereinafter the "1921 Act"), J.A. 93.

[7]*Synar v. United States, supra* note 1 at J.A. 60-61.

lution to the House and Senate floors, and Congress, not GAO, approves the across-the-board cuts needed to meet deficit targets.

In our judgment, this fallback provision is a logical extension of the provisions and procedures of the Congressional Budget and Impoundment Control Act of 1974,[8] and is a sound alternative to the role provided GAO in the Deficit Control Act. If the underlying budget and appropriations cycle fails to meet the budget targets, the fallback procedure will significantly improve the ability of Congress to achieve the targets by avoiding separate program-by-program review of spending. This is the type of review which frequently resulted in legislative logjams under prior laws.

Therefore, an otherwise unconstitutional delegation of authority to GAO need not be upheld for fear that it represents the only possible way for the Nation to reduce the budget deficit. The fallback procedure is a workable alternative to the GAO provisions of the Act, one which should enable the Nation to meet the law's deficit reduction targets in a manner that is consistent with the Constitution.

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[8]Pub. L. No. 93-344, § 1016, 88 Stat. 335 (1974), 2 U.S.C. § 687 (1982) (hereinafter the "Budget Act").

ARGUMENT

I.

Control of spending is inherently a legislative power, involving major policy decisions and trade-offs, which the Act unconstitutionally delegates without clear standards to GAO.

It is our experience as members of Congress that estimating the likely budget deficit, and deciding on the basis of that estimate appropriate spending levels, is a highly subjective and political task. Making such judgments is the essence of the legislative process. Responsibility for these policy decisions cannot be constitutionally delegated, certainly not without clearer standards than provided by the Deficit Control Act.

A. Decisions involving the scope and magnitude of the federal deficit, such as have been delegated here, are inherently political and subjective in nature.

The Deficit Control Act grants the Comptroller General the authority to determine the likely size of the deficit, and therefore the amount each federal agency can spend in the coming fiscal year. The Act empowers GAO to review the estimates made by both OMB and CBO, and to make its own judgments about economic growth, outlays and revenue levels, and savings likely to be achieved in programmatic spending.

After concluding how much overall spending, in its opinion, must be cut in order to meet the Act's deficit targets, GAO will determine the amount by which spending for each program, project or activity must be reduced. This GAO determination, which the President must then adopt without change, will override any existing law to the con-

trary. It will amend appropriation bills previously passed by Congress. It will override any substantive laws passed at any time in the past by Congress which might conflict with the requirement to reduce spending by a specific amount. It will amend both controllable expenditures and entitlement programs. For all practical purposes, GAO's action is the functional equivalent of a major, omnibus piece of legislation that Congress would pass only after careful consideration.

In undertaking this role, GAO will be making highly subjective and political judgments. Forecasts of budget deficits are based on projected revenues and expenditures. Both are heavily influenced by a variety of complex economic factors. Chief among these are interest rates, closely followed by unemployment and inflation rates, the trade deficit, and intervening factors such as the recent sharp decrease in the world price of oil. The budget process itself will change government programs, and these changes will make economic projections still more difficult. Budget deficit forecasts are even more uncertain because they must be made several months before the start of the fiscal year to which they pertain.

In some years OMB and CBO estimates of economic growth have been close; in other years they have differed markedly. In 1983, for example, OMB predicted that the economy would grow by 1.4%, while CBO suggested the level of GNP growth would be 2.1%, a figure that is 50% larger. In fact both predictions were wrong, and growth for the year was actually 3.5%.[9].

[9]Executive Office of the President, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1984, 2-9 (Jan. 1983);* Congressional Budget Office, *Baseline Budget Projections for Fiscal Years 1984-1988,* 9 (Feb. 1983); U.S. Department of Commerce, *Survey of Current Business,* 20 (Feb. 1986).

These errors translate into actual dollar amounts of substantial magnitude. A variation of one percentage point in the growth of the GNP, for example, changes the deficit by about $5 billion.

The fact is that both agencies have been consistently off in their forecasts by an average of about one percent in the years 1976 through 1984. *Neither* OMB nor CBO accurately forecast actual GNP growth in a single year.[10]. The deficit for this year promises to be equally hard to predict. For example, CBO believes the FY '87 deficit will be $16.1 billion higher than does the Administration.[11]

Minor changes in forecasts will in turn substantially alter the program cuts required under the sequestration process. A change of one percent in the projected interest rate may alter next year's predicted deficit, and the size of required federal cuts, by as much as $9 billion.[12].

According to Congressman Jack Brooks, Chairman of the Committee on Government Operations, budget forecasts amount to little more than educated guesses. "[T]hey are highly subjective judgments concerning many different factors, often involving arbitrary numbers and assumptions," and as such they may be "susceptible to political manipulation."[13]

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[10] *The Balanced Budget and Emergency Deficit Control Act: Hearings on H.J. Res. 372 Before the House Committee on Government Operations,* 99th Cong., 1st sess. (Oct. 17, 1985) (statement of L. Fisher, 161, Table 1) (hereinafter the "House Hearings").

[11] Congressional Budget Office, *An Analysis of the President's Budgetary Proposals for Fiscal Year 1987,* xv, Feb. 1986.

[12] Congressional Budget Office, *Economic and Budget Outlook: Fiscal Year 1987-1991: Report to the House and Senate Budget Committees,* Part I, 72 (Feb. 1986).

[13] Brooks, *Gramm-Rudman: Can Congress and the President Pass the Buck?,* 64 Tex. L. Rev. 131, 141, 153 (1985).

CBO, responsible for budget estimates under the Budget Act, is well aware of the politicl judgments inherent in forecasting the size of deficits. At House hearings in October 1985, CBO Director Rudolph Penner told Congress, "Well, sir, our real growth estimates have been somewhat more accurate [than those of OMB]. We have not won on every variable, but I do think it probably behooves any administration to set an optimistic tone. . ."[14] Penner noted "there is a wide enough array of forecasts on the street at any one moment that you can rationalize a wide set of choices."[15] He urged that there should be a legislative check to protect against the possibility of "irresponsible or incompetent" forecasts by OMB or CBO.[16]

But there is no legislative check here. For GAO to be making a judgment that is so "distinctively political,"[17] beyond the control of elected officials, in our opinion is contrary to sound public policy, and violates basic constitutional precepts governing allocation of powers among the branches of government.

B. Congress cannot constitutionally delegate such broad policy-making power, especially without adequate standards to guide its decisions.

The Constitution places authority to determine federal spending levels squarely in the hands of Congress. Article 1, Section 9, states "No money shall be drawn from the Treasury, but in consequence of Appropriations made by

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[14]House Hearings, *supra* note 10 at 160.

[15]*Id.* at 187.

[16]*Id.* at 181.

[17]On this key point our view differs from that of the District Court below. *Synar v. United States, supra* note 1 at 43-44.

law." Congress alone can make those laws. If there are to be any meaningful limits on the types of legislative responsibilities Congress can delegate, establishing spending limits must be one of "those important subjects, which must be entirely regulated by the legislature itself . . ."[18]

The powers delegated here are inherently legislative in nature. They cannot be exercised without making broad political and policy judgments which are the hallmark of legislation. Because these ultimate powers have been delegated without standards to the Comptroller General who, unlike Congress and the President, is not responsible to the electorate, we believe the section of the Act giving GAO sequestration power must fall.

We therefore take issue with the opinion of the District Court in this case, which suggested that GAO's role in the sequestration process was an executive branch function because it involved the "sort of power normally conferred upon the executive officer charged with implementing the statute."[19] We believe this does not properly take into account the extraordinary type of legislative authority involved here, and the highly judgmental nature of GAO's role in the deficit reduction process discussed above.

In making these judgments, GAO will decide how much the federal government will spend in any fiscal year, and may order the override of a myriad of laws in the process. These decisions can affect billions of dollars of spending by a wide variety of agencies. For example, CBO's estimate for the current year is that the deficit will be $181.3 billion. Budget outlays would therefore have to be cut by

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[18] *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42-43 (1825). *See also, Harrington v. Schlesinger,* 528 F.2d 455 (4th Cir. 1975); *Massachusetts v. Laird,* 451 F.2d 26 (1st Cir. 1971).

[19] *Synar v. United States, supra* note 1 at J.A. 72.

$37.3 billion to meet the Act's deficit target. If GAO happens to agree with the CBO estimate, it will mean $18.0 billion in defense cuts, and $19.3 billion in non-defense spending cuts, thereby affecting most federal agencies and programs.

Thus, our objection is to the nature of the delegation involved here, not to the way GAO is structured. In our view, there is nothing inappropriate about the way GAO is constituted, or about the fact that it performs "significant duties that are both 'legislative' and 'non-legislative', i.e. executive, in nature."[20] GAO's hybrid nature is analogous to the position occupied by independent regulatory agencies, whose status and method of operation has been repeatedly sanctioned by this Court.[21]

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[20] *Ameron Inc. v. U.S. Army Corps of Engineers,* Nos. 85-5226 and 85-5377, Slip Op. at 5 (3d Cir. March 27, 1986).

[21] *Yakus v. U.S.*, 321 U.S. 414 (1944); *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). In this regard, we believe Congress has properly utilized independent regulatory agencies to discharge a wide variety of functions. These agencies set rates, award routes, issue licenses, enforce standards, and make determinations under their various enabling statutes — functions that have been characterized as quasi-legislative (rate-making and rule-making activity), quasi-executive (administrative and enforcement activity) and quasi-judicial (interpretative and adjudicative activity). Although members of regulatory commissions are appointed by the President, the fact that they serve for set terms and are removable only for cause significantly insulates them from executive control.

In its decision in *Humphrey's Executor,* this Court upheld the independent agency concept. Speaking of the Federal Trade Commission the Court said, "Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control." 295 U.S. at 628.

Although the powers of an independent regulatory commission are not at issue here, the District Court's opinion questions *Humphrey's Executor* and the cases that follow it, and suggests that this Court should reconsider the concept of hybrid agencies that combine quasi-executive, quasi-judicial and quasi-legislative functions under a com-

It would make no difference, in our view, if GAO were purely an executive branch agency, or purely a legislative branch agency for that matter. Under the Constitution the broad powers involved here can only be exercised by one entity in our system – the Congress itself, acting through the normal legislative process, authorizing and appropriating overall spending levels for federal departments and agencies.

Of course Congress could agree to change the Constitution itself, as the President has requested, to provide the Executive with line-item veto authority. But thus far Congress has declined to grant such authority. Until it does, or until it changes the Constitution in some other way, the authority to set spending limits cannot be transformed into a "quasi-executive" function by the simple expedient of enacting a law purporting to delegate the authority to some agency. Otherwise, no legislative function would be beyond the ability of Congress to transform into an executive function.[22]

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mon roof with some degree of independence from executive branch control. *Synar, supra*, note 1 at 68-70.

We disagree. In our view *Humphrey's Executor* was good law in 1935, and it is good law today. In order to accommodate the workings of modern government, it is necessary that Congress be permitted to utilize such agencies to carry out the mix of functions assigned to them; it is also desirable to be able to provide a degree of independence from political intrusion as these decision-making powers are exercised.

[22]We concur in the warning sounded by Louis Fisher, an expert on both the Constitution and the budget, when Congress was considering the legislation, "I am hard pressed to think of another statute that makes such sweeping changes in the balance between branches. No other bill, to my knowledge, represents such a clear abdication of fiscal powers heretofore exercised by Congress and part of its responsibilities under Article 1 of the Constitution." House Hearings, *supra*, note 10 at 203.

The constitutional invalidity of the delegation in this case is further underlined by the lack of any standard governing GAO's actions. In exercising its sweeping powers GAO will be making predictions both value-laden and legislative in nature about the course of the economy which are the antithesis of the normal executive branch application of known facts to the mandates of a statute. No standards in the Act restrict GAO from basing its predictions on whatever economic or political grounds it may choose. It may direct the President to cut spending by whatever amount it chooses, without regard to whether its projection is similar to the numbers in the report prepared by CBO and OMB. It may act without fear of judicial challenge.

The delegation under review here is parallel in key respects to the scheme this Court struck down in *Schechter Poultry v. U.S.*[23] In *Schechter* the law authorized the President to approve detailed codes governing a wide variety of businesses subject to federal authority. The *Schechter* case was characterized by the broad scope of the legislative powers delegated, as well as by the lack of standards attending the delegation.[24] In this case, the delegation authorizing the Comptroller General to direct spending cuts affecting practically every citizen is equally broad. As in *Schechter,* the delegation is accompanied by few or no standards. The breadth and type of the delegation involved in this case thus places it directly within the *Schechter* ruling, and distinguishes it from the post-*Schechter* cases in which the courts have declined to hold delegations unconstitutional.[25]

[23]295 U.S. 495 (1935).

[24]1 K. Davis, *Administrative Law Treatise* §3:8 at 176 (2d ed. 1978).

[25]*Amici* endorse the more extensive discussion of this point contained in the brief of appellees, Mike Synar *et al.*

For these reasons, we believe the grant of such unprecedented powers to fix overall spending limits for federal agencies and programs – whether those powers are granted to an officer of the executive branch, or, as here, to a hybrid agency – must be struck down as an unconstitutional delegation of congressional authority. Only Congress, "in consequence of Appropriations made by law," can establish those spending limits.[26]

II

Long-standing Congressional Intent Bars Striking Down Congressional Removal Powers Over the Comptroller General.

Several parties to this case suggest that if the Court finds that GAO's role in the sequestration process is unconstitutional because of the potential congressional role in removing the Comptroller General from office, the appropriate remedy would be to strike down the provisions of the 1921 Act giving Congress a role in the removal of the Comptroller General.[27] We believe such a result would be inconsistent with congressional intent. Congress' intent is amply demonstrated both by the legislative history of the Deficit Control Act, and by the development of the earlier law by which the Comptroller General's office was created and various functions assigned to it.

The legislative history of the Deficit Control Act demonstrates that the House of Representatives rejected the idea of delegating sequestration authority to an agency fully controlled by the Executive. In its version of the bill, the House vested authority solely in CBO, subject to an obligation to consult with OMB.[28] In doing so, the House

[26]U.S. Const., art. I, § 9.

[27]*See* the 1921 Act, *supra* note 6 at 6, § 302.

[28]H.R. Rep. No. 433, 99th Cong., 1st Sess. 72 (1985).

rejected the original Senate proposal that the Directors of OMB and CBO have dual authority to make the operative determination under the Act. Had the Senate insisted on vesting final authority in an agency subject to exclusive Presidential control, we believe no legislation would have been enacted.

In enacting the Deficit Control Act, Congress selected the GAO precisely because it was the agency outside of the legislative branch most responsive to the control of Congress.[29] Congressional involvement in the removal process was central to this decision. To conclude otherwise would be to ignore the conscious efforts of Congress over the past sixty-five years to exercise increasing control over GAO.

In 1921, the Congress created the General Accounting Office and transferred many of the functions of the Comptroller of the Treasury to the new head of the GAO, the Comptroller General of the United States. The 1921 Act specified that the GAO would be "independent of the executive department." It provided for appointment of the Comptroller General by the President, but retained for Congress the power to remove the Comptroller General by joint resolution.[30]

After World War II, the Congress brought the GAO into a yet closer relationship. The Reorganization Act of 1945 declared GAO to be "a part of the Legislative Branch."[31] In that act, Congress removed GAO's budgets, like those of other congressional agencies, from OMB review. In the Ethics in Government Act of 1978, Con-

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[29]*See e.g.*, 131 Cong. Rec. H9597-98 (daily ed. Nov. 1, 1985) (Statement of Rep. Rostenkowski).

[30]The 1921 Act, *supra* note 6 at 6, §§ 302 & 306.

[31]Act of Dec. 20, 1945, ch. 582, Tit. 1, § 7, 59 Stat. 613.

gress again took the occasion to define the GAO as a part of the legislative branch for purposes of that act.[32]

In 1980, the Congress enacted legislation[33] requiring the President to appoint the Comptroller General from among a congressionally selected list of nominees. Thus, Charles Bowsher, the incumbent Comptroller General, was selected by President Reagan in 1981 from among the nominees submitted by members of Congress in accordance with the provisions of this legislation.

Congress has thus built on the basic 1921 Act to create a close working relationship with GAO. To declare the 1921 removal provision unconstitutional after all these years would destroy one of the basic blocks on which that close relationship rests. We do not believe that Congress, without any hearings or any discussion, intended to compromise its entire relationship with GAO in order to save the sequestration process from constitutional difficulty.

To the contrary, there is clear affirmative legislative evidence that, if the role of GAO in the sequestration process were held unconstitutional, Congress intended the Temporary Joint Committee to be used instead. As discussed in the next section, this process provides a fully effective alternative way of accomplishing sequestration.

In the Conference Report accompanying the Deficit Control Act, the conferees stated:

> The Conferees do not believe that any constitutional authority or requirement to avoid sequestration of any federal spending exists, but have included this provision as a "Fail Safe"

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[32]Pub. L. No. 95-521. Tit. I, §101, 92 Stat. 1824, (1970), 2 U.S.C. § 701(e) (1982).

[33]Pub. L. No. 96-226, 94 Stat. 314 (1980), 31 U.S.C. § 703 (1982).

> mechanism against a successful contrary claim upsetting the balanced provisions of the Act.[34]

As one of the leading supporters of the Deficit Control Act said on the floor of the House during debate of the measure:

> 'In the event that the CBO, OMB, GAO trigger mechanism is found unconstitutional, the Senate version has a fallback provision, a clearly constitutional expedited joint resolution process.' So they even built in their package that we are going to be considering further this option that if it should be held unconstitutional, there would be this backup provision.[35]

Thus, there is clear indication that Congress intended that this Court rely upon the fallback provision specifically provided in case of constitutional infirmity, rather than reaching to strike down a long-standing provision of law that Congress has buttressed and reinforced over the past sixty-five years.

III

The Effectiveness of the Deficit Control Act is not Dependent on Retaining GAO's Role in the Sequestration Process.

In prior cases where delegations have been upheld, a key factor has been the pragmatic need for Congress to assign to others the filling-in of details within broad legislative parameters.[36] Such pragmatic necessity is not involved in this instance. Indeed, Congress in the Deficit Control Act

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[34]H.R. Rep. No. 433, 99th Cong. 1st Sess. 100 (1985).

[35]131 Cong. Rec. H.9866 (daily ed. Nov. 7, 1985) (Statement of Rep. Lott).

[36]*United States v. Grimaud,* 220 U.S. 506, 517 (1911); *Lichter v. United States,* 334 U.S. 742, 779 (1948).

has provided new *congressional* procedures for dealing with deficits, and has established in the Act a *congressional* fallback procedure to take the place of the GAO role in the sequestration process in case the delegation to the GAO did not pass constitutional muster. As discussed below, this fallback provision can be a fully effective substitute for the involvement of GAO.

A. Even apart from the sequestration provisions, the Deficit Control Act significantly tightens the procedures of prior law.

Entirely apart from the sequestration process, the Deficit Control Act contains a number of provisions designed to significantly tighten the law's procedures. Under the Budget Act prior to its amendment by the Deficit Control Act, Congress had the option of utilizing a second (binding) budget resolution to accommodate changes in economic or technical assumptions, as well as policy initiatives not assumed in the first (target) budget resolution. It could call for lower spending or higher revenues to enforce its earlier deficit goal. In practice, in the second budget resolution, Congress usually reaffirmed the targets or revised the first budget resolution to acknowledge larger deficits, rather than attempting another round of budget cuts to meet the earlier goal.

The Deficit Control Act takes away the latitude provided to Congress by the second budget resolution process. Thus, even apart from GAO's role in the "trigger" mechanism, the Act establishes major new controls to reduce budget deficits and correct problems with the budget process in recent years. In particular, Section 201 of the Act commits the Congress to annual deficit reduction targets. Section 251 commits the Congress to achieving those targets by adopting proportional across-the-

board cuts of programs and activities. By committing itself to this approach in the event that it was otherwise unable to achieve the targets through the usual priority-setting process, Congress agreed to forego the program-by-program effort which has proved politically so difficult in the past.

To achieve these policy goals, the Deficit Control Act, as it amended the Budget Act, adopts a system of mutually reinforcing procedural steps to ensure reductions wholly apart from GAO-directed sequestration orders. Thus, Section 301(i) of the Budget Act as amended bars the Congress from adopting any budget resolution with a deficit exceeding the target level, and permits waiver of the rule only by a three-fifths vote. Section 310(d) requires that amendments to the budget reconciliation bill be neutral in impact upon the deficit, and Section 302(f) prohibits House or Senate consideration of legislation that would cause a committee to exceed its budget allocation. Further, Section 310(d) provides that any budget reconciliation bill providing new budget or entitlement authority are subject to motions to strike.

The Deficit Control Act also changes legislative priorities to discourage spending bills that might exceed budget targets. Section 302(c) of the Budget Act as amended prohibits House and Senate committees from reporting spending or credit legislation until they have allocated their budget, entitlement and credit authority among subcommittees or programs.

Finally, Sections 300 and 301 of the Budget Act as amended accelerate the budget timetable, and provide for only a single binding concurrent budget resolution (rather than the two required under prior law). This will encourage completion of congressional budget action, in-

cluding appropriations and reconciliation bills, before the automatic spending reductions would be triggered.

All of these measures represent an extraordinary congressional commitment to deficit reduction, accomplished at the cost of prerogatives traditionally accorded congressional committees and their leaders.

B. The fallback sequestration procedure provides additional assurance that Congress will reach agreement on the budget targets.

It is in this larger context that Section 274(f) of the Deficit Control Act provides an effective fallback to implement the across-the-board cuts should GAO's role be held unconstitutional. Under the fallback process a Temporary Joint Committee on Deficit Reduction is established, consisting of the membership of the Budget Committees of the House of Representatives and the Senate. Members of other Committees are not involved to avoid problems arising in past House-Senate budget reconciliation conferences, which have involved as many as 250 members of Congress. The Chairmen of the two budget committees act as Co-Chairmen of the Joint Committee.

Under the fallback provision, the Joint Committee, rather than the Comptroller General, will receive the report of the Directors of the Congressional Budget Office and the Office of Management and Budget. Not later than five days after its receipt of the Directors' report, the Joint Committee must report a joint resolution to the House and to the Senate reflecting the contents of the Directors' reports.

Thereafter, consideration of the joint resolution follows the special procedures relating to the consideration of a joint resolution under Section 254(a)(4) of the Act except

that floor debate is limited to two hours in each House. The joint resolution is not amendable, debate is limited, and a vote on final passage must be taken within five days after the resolution is reported. The new process guarantees expedited consideration of the joint resolution. Upon enactment, the joint resolution will have the same effect as was intended for the Comptroller General's report to the President, and the sequestration process will begin.

The new fallback procedure should be compared to the prior process. Before the Deficit Control Act, the only binding legislative vehicle utilized to achieve overall spending limits (other than the regular appropriations bill) was the reconciliation bill, which made all changes in permanent law required by any targets set in the various budget resolutions. The reconciliation bill was handled under relatively traditional congressional procedures: the resolution was reported to the House and Senate by the separate budget committees of the two houses; on the Senate floor the legislation was fully open to amendment, on the House floor amendments were permitted according to the usual resolution governing debate; a House-Senate conference committee was needed to hammer out differences between the two bodies; and there was nothing whatsoever to guide the Congress in allocating reductions among the various federal departments and programs.

The joint committee fallback procedure avoids most of these legislative pitfalls. By utilizing the joint committee mechanism, Congress will avert many of the inefficiencies and delays inherent in bicameralism: a *single* resolution will be reported to the House and Senate floors; the resolution is not subject to amendment during floor consideration; and Congress is governed by the strict guideline that cuts must be made in federal agencies and programs on a

pro rata, across-the-board basis with very limited exceptions. This last factor, in particular, will help ensure that members will not try to protect their particular pet agencies or legislative programs through legislative "horse trading" or outright opposition to a specific provision cutting spending for a particular agency. To a significant degree, the joint committee fallback procedure will enable Congress to operate with the discipline and unity enjoyed by a unicameral legislature, and the chances that the House and Senate will both *begin* and *end* with the same set of numbers are vastly increased; this in turn greatly increases the chances that Congress will approve the required sequestration process.

Congress does not lightly establish joint committees, even those which are temporary in nature. To give a joint committee the power to report a joint resolution is extraordinary indeed.[37] Congressional reluctance to establish joint committees is rooted in bicameralism and the committee process. Legislators are understandably jealous of the prerogatives of their respective Houses and of already established committees.[38] The two most important factors in the establishment of a joint committee, even one without legislative authority, are: (i) a crisis, national or international, which both Houses seek to resolve jointly, and (ii) support for the creation of a joint committee to give visibility and attention to the problem.[39]

Virtually the only precedent for a joint committee with legislative authority is the Joint Committee on Atomic

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[37]*Deschler's Precedents of the United States House of Representatives,* H.R. Doc. No. 94-661, 94th Cong., 2d Sess. 337 (1974).

[38]Oleszek, *House-Senate Relationships: Comity and Conflict,* 411 Annals of the Am. Acad. of Pol. and Soc. Sci. 75, 82 (1974).

[39]*Id.* at 84.

Energy which was established on August 1, 1946 and abolished on September 20, 1977.[40] The continuing need for secrecy following World War II and the importance of atomic energy research led to the formation of this committee.[41] The Joint Committee on Atomic Energy was once described as follows:

> The Joint Committee on Atomic Energy is, in terms of its sustained influence in Congress, its impact and influence on the Executive, and its accomplishments, *probably the most powerful Congressional committee in the history of the nation.*[42]

There is similar reason to expect that the Joint Committee established by the fallback provision would be equally powerful and effective.

The Deficit Control Act, by adopting all the procedures described above, promises to improve greatly the congressional budget process. In our judgment, the budget process can and will work effectively without assigning GAO a pre-eminent role in establishing spending levels for federal programs and agencies, a role which is unprecedented in our nation's constitutional history.

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[40]Pub. L. No. 95-110, 91 Stat. 884, §301 (1977), 42 U.S.C. §2258 (1982).

[41]H. Green & A. Rosenthal, *The Joint Committeee on Atomic Energy* 4 (1961) (quoted in Oleszek, *supra* note 38 at 83).

[42]*Id.* at p. 4. Emphasis added.

CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the District Court be affirmed.

Respectfully submitted,

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